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In the Supreme Court of the United States

OCTOBER TERM, 1930.

No. 54

I. J. VAN HUFFEL,
Petitioner,

vs.

TRACE D. HARKELRODE, Treasurer of Trumbull County, Ohio, successor in office and substituted as party defendant for Frank F. Musser, former Treasurer of Trumbull County, Ohio,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TRUMBULL COUNTY, OHIO.

BRIEF OF RESPONDENT
Opposing Petition for a Writ of Certiorari.

G. H. BIRRELL, *Prosecuting Attorney,*
Trumbull County, Ohio,
GEO. W. SECREST, *Assistant Prosecuting Attorney,*
Attorneys for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, O.

In the Supreme Court of the United States

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No. 906.

I. J. VAN HUFFEL,
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Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TRUMBULL COUNTY, OHIO.

BRIEF OF RESPONDENT
Opposing Petition for a Writ of Certiorari.

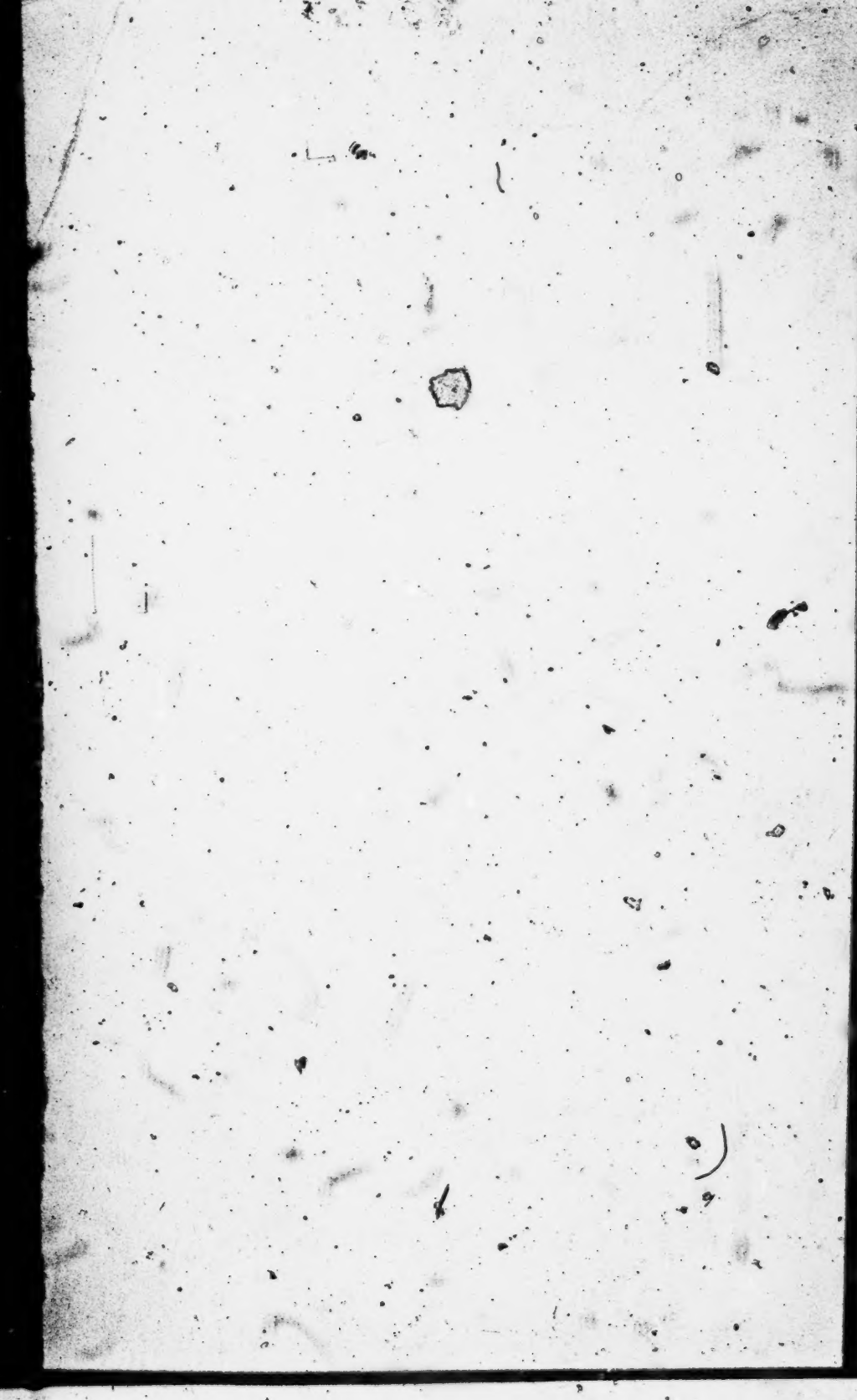
To the Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

The brief of the respondent, Trace D. Harkelrode, Treasurer of Trumbull County, Ohio, is herewith submitted for the consideration of this Honorable Court:

public revenue, such treasurer, auditor, or other officer, shall be allowed and paid out of the county treasury reasonable fees of counsel and other expenses for defending the action. The amount of damages and costs adjudged against him, with the fees, expenses, damages, and costs shall be apportioned ratably by the county auditor among all the parties entitled to share the revenue so collected, and be deducted by the auditor from the shares or portions of revenue at any time payable to each, including as one of the parties, the state itself, as well as the counties, townships, cities, villages, school districts, and organizations entitled thereto."

"§5701. *County solicitor to attend such suits.*—In each county in which there is a county solicitor, or a board of control having a soliciter, the county solicitor and the solicitor of such board shall take charge of and attend to all actions against any county officer in such county for performing, or attempting to perform, any of the duties authorized by law. Such officers shall not employ any other counsel to defend such action or suit."

Under this section in *Brewster v. Anderson*, 1 O. C. C. 268, it was held that appearance for officers in tax recovery may be entered by the County Solicitor.



II.

ARGUMENT.

I. Did the Bankruptcy Court, without making other provisions for the payment of the taxes in question, have jurisdiction to issue its decree divesting the State of Ohio and Trumbull County of their lien for taxes against the real estate of the bankrupt, where such taxes have been legally and lawfully assessed and made a permanent lien by the laws of the State of Ohio until paid or otherwise discharged by law; or is such a decree, which in effect destroys the right of the State and County to collect such taxes, in excess of the jurisdiction of the Bankruptcy Court thereby rendering such decree void and open to collateral attack?

The statement of the proposition of law involved, on page 22 of the petitioner's brief, is misleading to the Court by reason of the fact that it is not comprehensive of the whole situation. The sole question there presented is whether the Court of Bankruptcy could order the real estate of the bankrupt sold free and clear of the lien of the State of Ohio and Trumbull County for taxes and transferring such lien from the real estate to the fund derived from the sale thereof. This omits entirely from consideration that part of the decree which made the lien of the State subsequent to that of the first and second mortgages which in effect, not only transferred the lien of taxes to the fund arising from the sale, but in effect destroyed the lien which was intended to be made permanent by the laws of the State until paid.

The first point raised is as to the jurisdiction of the Court of Appeals to inquire collaterally into the validity of the judgment rendered by the Federal Court in the bankruptcy proceedings of the Sterling-Knight Motor

Company. The doctrine that a judgment in a case, of which the Court has once acquired jurisdiction, cannot be collaterally assailed is only correct where the Court proceeds, after acquiring jurisdiction, according to the established modes governing the class to which the case belongs; and does not transcend, in the extent or character of its judgment, the law which is applicable to it. Where the Court transcends the limits of its authority, its judgment is not merely erroneous but is entirely void:

> "Although a court may possess jurisdiction of a cause of the subject matter and of the parties, it is still limited in its mode of procedure, and in the extent and character of its judgments. It must act judiciously in all things, and cannot then transcend the power conferred by law."
>
> *Windsor v. McVeigh*, 93 U. S. 274-282, 23 L. Ed. 917.

The consequences of a void judgment are found in *Black on Judgments*, Second Edition, Vol. 1, Section 170, page 248, where the following language appears:

> "Now a 'void' judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever, it has no effect as a lien upon his property, it does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied before; it gives him no new right, but an attempt to enforce it will place him in peril. As to third persons, it can neither be a source of title nor an impediment in the way of enforcing their claims. It is not necessary to take any steps to have it reversed, vacated, or set aside. But whenever it is brought up against the party, he may assail its pretensions and show its worthlessness. It is supported

by no presumptions, and may be impeached in any action, direct or collateral."

In that text reference is also made to a decision of the Supreme Court of the United States, where, in the case of *Elliot v. Peirsol,* 1 Pet., 328, at 340, 7 L. Ed., 164, the Court said:

> "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other Court. But if it act without authority, its judgments and orders are regarded as nullities. They are not avoidable but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered in law as trespassers."

From these decisions, and there are many others, for the question is elemental, it appears that a judgment rendered by a Court in excess of the jurisdiction conferred is absolutely void, and a nullity with no force and effect whatsoever, which judgment may be impeached in any proceedings whether direct or collateral.

The next question to be raised concerns the jurisdiction of a Court of Bankruptcy, with respect to the lien of the State and County for taxes.

Generally speaking, the origin of the Courts of Bankruptcy is statutory and they have no further powers or jurisdiction than is specifically conferred on them, or necessarily implied from the statutes creating them. That is to say, their jurisdiction is limited, and their judgments possess only those attributes of finality which are acquired through the exercise of the statutory jurisdiction conferred upon them:

Elmira Steel Co. (D. C., N. Y.) 5 Am. B. R. 484, 109 Fed. 456;

In re: Williams (D. C., Ark.) 9 Am. B. R. 741, 120 Fed. 38;

Brumbey v. Jones (C. C. A., 5th Cir.) 15 Am. B. R. 578, 141 Fed. 318;

Houston v. Shear (Tex. Ct. of Civ. App.) 43 Am. B. R. 462, 210 S. W. 976;

Matter of Hollins (C. C. A., 2d Cir.) 36 Am. B. R. 168, 229 Fed. 349.

Section 104, Title 11, U. S. C., §64 (a) of the Federal Bankruptcy Act, dealing with the question of priorities, says in part:

> "The court shall order the trustees to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality, in the order of priority as set forth in paragraph (b) hereof: PROVIDED, That no order shall be made for the payment of a tax assessed against real estate of a bankrupt in excess of the value of the interest of the bankrupt estate therein as determined by the court. Upon filing the receipts of the proper public officers for such payments the trustee shall be credited with the amounts thereof, *and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.*" (Italics ours.)

We wish to call the Court's particular attention to the last phrase above cited, by the terms of which the only power conferred upon the Bankruptcy Court is to inquire as to the *amount* or *legality* of such tax. There is no question involved in the case at bar either as to the legality of the tax imposed or as to the amount thereof. The question relates solely to the power of the Bankruptcy Court to divest the lien of the State and County for its taxes, and if the Court inquired into the taxes other than as to their legality, or their amount, then it was exercising an authority in excess of the jurisdiction conferred upon it by the Bankruptcy Act.

This is clearly the intent of the Statute, inasmuch as it requires the Trustee to pay all taxes, legally due and owing by the Bankrupt, to the various taxing powers of the country. It is not a question of an erroneous judgment upon the part of the Bankruptcy Court, but it is a question which goes directly to the root of the Court's jurisdiction, and there is no question but that the Bankruptcy Court, in disturbing the lien of the State for its taxes, exercised a jurisdiction which was not conferred upon it by the Statutes creating the Court.

As a further aid in determining this question it might perhaps be of value to inquire into the general nature and extent of the taxing power of the State. This right to levy and collect taxes has always been recognized as one of the supreme powers of the State, essential to its maintenance, and for the enforcement of which the legislature may resort to such remedies as it chooses, as long as it keeps within the rights of the citizens, and does not impair the constitutional protection given them. It is a power exercised and controlled by legislative authority only, and not by the judiciary:

Union Pac. R. R. v. Peniston, 18 Wall. 5, 21 L. Ed. 787;
Leigh v. Green, 193 U. S. 79, 48 L. Ed. 623;
Thompson v. Allen Co., 115 U. S. 550, 29 L. Ed. 472;
Spencer v. Merchant, 125 U. S. 345, 31 L. Ed. 763;
Cleveland v. Edwards, 109 O. S. 598, at page 604;
Western Union Telegraph Co. v. Mayer, 28 O. S. 521.

In the last cited case, we find the following words at page 533:

> "The power of the state to collect taxes for public purposes, is an inherent and indispensable incident of sovereignty. Without it no civilized state could discharge its functions."

Acting under the authority delegated to it the Legislature of Ohio enacted what is now known as Sec. 5671 of the General Code of Ohio which reads as follows:

> *"The lien of the state for taxes levied for all purposes, in each year, shall attach to all real property subject to such taxes* on the day preceding the second Monday of April, annually, *and continue until such taxes, with any penalties accruing thereon, are paid.* All personal property subject to taxation shall be liable to be seized and sold for taxes. The personal property of a deceased person shall be liable, in the hands of an executor or administrator, for any tax due on it from the testator or intestate." (Italics ours)

The purport of the above Statute is that the taxes, together with the penalties accruing thereon, are a permanent lien against the real estate assessed, which lien is perpetual and can only be removed by payment in full or be discharged according to other provisions enacted by the Legislature.

In the case of the *Security Trust Company v. Root*, 72 O. S. 535, the question arose as to whether the purchaser at a tax sale had a title paramount to that of a purchaser of the same real estate acquired through the sale of the same property in a foreclosure proceedings pending at the time of the tax sale. The Court held that the title of the purchaser at the tax sale was paramount, and said in part in its opinion:

> "* * * The lien of the state for taxes could not be ousted by a sale in foreclosure, and the state's lien having been, by virtue of this statute, transferred to the purchaser at the sale, it was neither satisfied nor discharged by the decree in foreclosure and the sale thereunder. The taxes were a lien paramount to all other liens and claims when the foreclosure suit was commenced, and the taxes were then delinquent as shown by the treasurer's duplicate, and before decree

the auditor's duplicate gave constructive notice that the defendant had purchased and had acquired a tax certificate. * * *"

In the above case the opinion of the Court of Appeals is found in 4 O. C. C. (N. S.), 129, and the Court in a well reasoned opinion commented upon the lien of the State for taxes as follows:

> "The lien of taxes on land, in favor of the state, and the right of the state to proceed to the collection thereof, in the mode provided by law, are paramount to the ownership or interests of private parties, and are not affected by the circumstance that a suit may be pending to foreclose and extinguish the title of the owner. It is not necessary or proper to make officers, upon whom the duty devolves to collect these revenues, or the state, or political bodies to which these revenues go, parties defendant to the action. The government and its officers are not to be hindered, delayed or obstructed in proceeding according to law to collect taxes for the support of the government, by the litigation of private persons with respect to rights and interests subordinate to the claims of the state."

The State of Ohio having the sovereign power of taxation, and giving to its Legislature the right to enact such laws as are within the constitutional limitations, and the Legislature having provided that the lien of the State for taxes against real estate may be removed only through payment, or through the provisions of the act for the sale of delinquent land taxes, the question then arises as to whether or not the sale of this property, free and clear of encumbrances, by the Trustee in Bankruptcy, would have the effect of removing the lien of the State for taxes legally assessed against the premises in question.

In the case of *Osterberg v. Trust Co.*, 93 U. S. 429, 23 L. Ed. 964, the Court held, in its opinion, as follows:

"* * * A lien for taxes does not, however, stand upon the footing of an ordinary incumbrance, and is not displaced by a sale under a pre-existing judgment or decree, unless otherwise directed by statute. It attaches to the *res* without regard to individual ownership, * * *."

To this same effect is the case *In re Veitch,* 101 Fed. 251, where it was held:

"Where real estate of a bankrupt, mortgaged for more than its value, and also subject to the lien of taxes assessed thereon (the tax lien being made paramount to that of the mortgage by the laws of the state), is sold to the mortgagee, and his claim against the bankrupt's estate for the deficiency proved and allowed, the court will not order the taxes to be paid out of the funds of the estate, since such payment would operate to the benefit of the mortgagee, in prejudice of the rights of general creditors, and since the taxes are, in any event, secured."

The Supreme Court of Ohio, in the case of *Monroe v. Doe,* 7 O. 262, held that the Statute of Limitations did not apply to any proceedings brought for the sale of property for delinquent taxes, and in its opinion the Court said in part, at page 265, as follows:

"* * * True, the land taxed is not forfeited to the state until it has been offered for sale. But still, the state has a lien upon all land not exempt from taxation, which is calculated to be perpetual, and which can not be affected by any sale or transfer. 29 Ohio Stat. 278. Neither will any length of possession affect this lien. *It can be removed in no other way than by the payment of all taxes, penalties, and interest due upon the land.* * * *"

Perhaps most nearly in point of any of the cases which we have been able to find upon this subject is the case of *Stokes v. State of Georgia,* 42 Ga. 412, 12 A. R. 588. In that case the purchaser of certain real estate bought at a

bankrupt sale, under order of the bankruptcy court, free and clear of all encumbrances, attempted to defend the sale of his property by the State for taxes on the ground that the same had been purchased from the Trustee in Bankruptcy free and clear of encumbrances. The opinion of the Court, which is short, is here quoted in full:

> "1. It has been said by a judge of a United States Court that 'the power of taxation is a sovereign political power, and a branch of the power of eminent domain.' Brightley's Fed. D. 158. Georgia expressly retains this power over all property in the State, and follows the property for the payment of her taxes, in whosoever hands found. The tax payer cannot dispose of his property so as to divest her of this right. Code, 809, 810, 811. The bankrupt law does not attempt to deprive a State of this power. True, it makes provision for the payment of the State taxes, if the State chooses to come into the bankrupt court and claim them, but she cannot be compelled to come in. Hence, the assignee, by sale of a bankrupt's property, cannot divest the right of the State to enforce the payment of her taxes on the property, wherever it may be found.
>
> 2. If it is true that the property is bound for the taxes, it makes very little difference who the owner of that property is, or how a tax execution describes it, so it is done with sufficient definiteness to enable the levying officer to ascertain the property."

The above case has been cited with approval and followed in the case of *Mesker v. Koch*, 76 Ind. 68.

The general authority granted to Congress by Art. 1, Sect. 8, paragraph 4, of the Constitution is limited by the definition of the term "bankruptcies." (p. 24 Brief.) In England at the time this phrase was used in the Constitution, the laws on bankruptcy were held not to affect the rights of the Sovereign State to collect its revenues.

United States vs. Herron, 20 Wall. 251, 22 L. Ed. 275, 87 U. S. 251.

At page 278 Mr. Justice Clifford says:

> "Nor does the bankruptcy act impair or supersede the laws for the collection of taxes,"

and he further observes:

> "Greater unanimity of decision in the Courts or of views among text writers can hardly be found upon any important question than exists in respect to this question in the parent country, nor is there any diversity of sentiment in our courts federal or state * * * of this country."

Woodyard vs. Sayre (W. Va.), 110 S. E. 689; 24 A. L. R. 1497, 2 syllabus:

> "At common law the state had the prerogative right independently of statute to preference and priority of payment over all general creditors for all debts, taxes or other demands in the distribution of the estate of an insolvent debtor."

Marshall vs. New York, 254 U. S. 380, 65 L. Ed. 315.

The sovereign states therefore never surrendered to the United States the power to authorize a bankruptcy court to interfere with their revenues, nor have the bankruptcy courts attempted to assume such power.

2. The Court of Appeals of Trumbull County, Ohio, gave full faith and credit to the judgment and decree of the District Court of the United States.

It will clearly appear from the opinion of the Court of Appeals of Trumbull County (R. 13) that full faith and credit was given to the judgment and decree of the District Court of the United States. Full faith and credit does not mean that the Court of Appeals was bound to follow the decision of the District Court when that decision was clearly in excess of the jurisdiction conferred upon it by the Bankruptcy Act, and amounted to an interference with the sovereign right of the State of Ohio to collect its taxes in the manner provided by its laws.

I.

SUMMARY STATEMENT OF POINTS OF FACT AND OF LAW.

In the matter of the Sterling Knight Motor Co., Bankrupt, pending in the United States District Court for the Northern District of Ohio, Eastern Division, the trustee in bankruptcy filed his petition to marshal the liens against certain real estate belonging to the bankrupt, situated at Warren, Trumbull County, Ohio, praying for an order to sell the real estate free and clear of encumbrances and that the liens be transferred to the funds arising from the sale.

In this proceeding, the Treasurer of Trumbull County, Ohio, was named a party defendant, a notice of the pendency of the action was mailed to him, and thereafter he mailed to the referee in bankruptcy a statement of the taxes appearing on his records, but he did not enter any further appearance nor was he present at any of the hearings before the referee, in person or represented by counsel.

The referee ordered the property sold free and clear of encumbrances and transferred the liens against the property to the fund arising from the sale. In his decree the court found that the taxes were correct in amount and legally assessed, but that the lien of the State of Ohio and Trumbull County for such taxes against the real estate was a third lien and subsequent to the liens of both the first and second mortgages.

The property was subsequently sold pursuant to the order of the referee, and was purchased at the sale by The Union Trust Company of Cleveland, Ohio, as Trustee for the first mortgagee, for an amount much less than the value of its mortgage, which mortgage was set off against the purchase price so that no fund was created

from which the taxes could be paid. No proceedings were brought by the Treasurer to reverse the finding of the referee for the reason that he did not know of the finding until the time for instituting error proceedings had expired. Subsequent to the sale and purchase, The Union Trust Co., Trustee, conveyed the premises to a holding company, The Warren-Cleveland Company, which in turn conveyed by warranty deed to I. J. Van Huffel, the petitioner in this cause.

The taxes remaining unpaid upon the records of the Treasurer of Trumbull County, the petitioner brought this action in the Common Pleas Court of Trumbull County to quiet his title against the claim of the respondent for taxes, who by way of answer set forth the fact that the taxes in question appeared upon his records unsatisfied and unpaid, and prayed for the dismissal of the petition. By way of reply, petitioner set forth the proceedings in the bankruptcy court contending that, by virtue of the decree of that court from which error was not prosecuted, the matter was adjudicated by a Court of competent jurisdiction having jurisdiction of the subject matter and the person.

The foregoing is but a brief general statement of the facts involved, a detailed statement being found in the finding of fact by the Trumbull County Court of Appeals on page 19 of the Record.

The respect accorded the rights of the State by the Federal Courts is clearly set forth in the comments of Mr. Justice Brandeis in *Marshall vs. New York*, 254 U. S. 380, 65 L. Ed. 315 at page 318:

> "While by the common law of England and by that of New York the priority (of taxes) does not obtain over a specific lien created by the debtor before the sovereign undertakes to enforce its right, the legislature of the State of New York extended the prerogative right so as to give certain taxes priority over prior encumbrances. An extension of this nature is found in No. 197 of the Tax law which declares in respect to the annual franchise tax that 'such tax shall be a lien upon and bind all the real and personal property of the corporation * * * from the time when it is payable until the same is paid in full.' By reason of that provision the annual franchise taxes take take priority over encumbrances on the corporate property (reference) * * *. Whether the priority enjoyed by the State of New York is a prerogative right or merely a rule of administration is a matter of local law. Being such the decisions of the highest state court as to the existence of the right and its incidents will be accepted by this Court as conclusive."

In our instant case the highest court of the State of Ohio, under a law similar to that of the State of New York has held that the taxes levied for the benefit of the State are a lien prior to other encumbrances (*Security Trust Co. v. Root*, 72 O. S. 535). It would seem that the doctrine of the *Marshall* case should apply, i.e., the United States should follow the interpretation of the State of Ohio with respect to the priority of its tax claims.

3. Conclusion.

From the cases and statutes above quoted, it is clear that the jurisdiction of the Bankruptcy Court is a limited jurisdiction, and that that court has no other or further jurisdiction than is specifically given it by the statutes

creating it or necessarily implied therefrom. These statutes specifically limit the jurisdiction of the Bankruptcy Court to an inquiry as to the amount and legality of the taxes imposed, and consequently give the Bankruptcy Court no right to divest the lien of the State for its taxes nor to disturb the priority of that lien.

The right of the State of Ohio to follow all real estate within its jurisdiction for the payment of taxes, is a sovereign right, which it never intended to delegate to the Federal Government and with which the Federal Government never intended to interfere and is a right with which no court can interfere unless the legislature has specifically given it jurisdiction. The fact that the decision here was rendered by the Federal Bankruptcy Court makes no difference, for neither that court nor any other court has jurisdiction to disturb the priority of the State for its taxes, nor to divest the real estate of the lien of such taxes; and any decree affecting such tax lien, either of a Federal Court or of a State Court, which exceeds the jurisdiction in the matter of taxes specifically granted by the Legislature of Ohio, is absolutely void, and is a nullity with no force and effect and may be impeached either directly or collaterally.

We are, therefore, of the opinion that the finding of the Court of Appeals of Ohio was correct and that the writ of certiorari herein prayed for should be refused.

Respectfully submitted,

G. H. BIRRELL,
Prosecuting Attorney of Trumbull County, Ohio,

GEO. W. SECREST,
Assistant Prosecuting Attorney,
Attorneys for Defendant in Error.